



DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS
333 Market Street, Room 923
San Francisco, California 94105-2195

REPLY TO
ATTENTION OF:

Civil Works and Management Directorate
Operations Division

5 Feb 2001

Ms. Penelope Alexander-Kelly
Gresham, Savage, Nolan & Tilden, LLP
600 North Arrowhead Avenue, Suite 300
San Bernardino, California 92401-1148

Dear Ms. Alexander-Kelly:

This letter responds to your Request For Appeal (RFA) of an approved jurisdictional determination (JD) File Number 200001678, for the Molycorp Inc. "East Tailings Storage Area" in Wheaton Wash, in Mountain Pass, San Bernardino County, California, issued December 16, 2000 by the Los Angeles District (district). You are requesting that the Corps rescind this jurisdictional determination based on the recent United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178 (SWANCC decision) issued on January 9, 2001.

The SWANCC decision was issued 24 days after completion of the district's JD. It represents new information that was obviously unavailable to the district when the JD was issued. I agree it is appropriate to have your JD reconsidered in relation to the SWANCC decision, but such reconsideration is appropriately done at the district level. As explained at 33 CFR 331.6 (c): "*An RFA that contains new information will either be returned to the district engineer for reconsideration or the appeal will be processed if the applicant withdraws the new information.*" Therefore, I am not accepting your RFA at this time, but am returning it to the district engineer for reconsideration of this new information. This will provide you the opportunity to have this JD considered in regard to the SWANCC decision before an appeal is undertaken.

My authority during the appeal process as explained at 33 CFR 331.9 is to determine whether "*...the (district's) decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corp policy guidance.*" The remedy provided by the appeal process as described at 33 CFR 331.10 (b) is "*If the division engineer determines that the appeal has merit, the final Corps decision is the district decision made pursuant to the division engineer's remand -*

of the appealed action.” If I accepted your appeal, found it had merit, and subsequently remanded it to the district engineer for reconsideration, your client would receive the same remedy as providing the new information to the district now. However, I do not have the authority through the appeal process to rescind the jurisdictional determination made by the district. Once the district has considered your new information, and reached a decision regarding any necessary modification of this approved JD, you will still be able to appeal that decision in accordance with the provisions of 33 CFR Part 331.

I encourage you to discuss with district representative Mr. Antal Szijj, telephone number (909) 794-7704, how the SWANCC decision affects the JD for your proposed project. If you have additional reasons to appeal this JD that are not based on new information, you must submit them within 30 days of the date of this letter for possible consideration under the appeal regulation at this time. If you have any further questions regarding this RFA or the appeal process in general, you may direct them to my Appeal Review Officer, Mr. Douglas R. Pomeroy, at telephone number 415-977-8035.

Sincerely,

original signed by

Peter T. Madsen
Brigadier General, U.S. Army
Division Engineer

Copy Furnished:
Commander, Los Angeles District
CESPL-CO-R (ATTN: Antal Szijj)
CESPD-CM-O/Pomeroy
CESPD-CM-O RF